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E. ROBERT SEAVER,

IN THE

Supreme Court of The United States

No. 70-5009

THEON JACKSON,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

Page

Table of Authorities ii

Questions Presented For Review 1

Statement of the Case 2

Summary of Argument 4

Argument 6

Jackson's Commitment Under Burns § 9-1706a As Incompetent to Stand Trial On Charges Of Robbery Does Not Constitute A Violation Of The Proscription Against The Cruel And Unusual Punishment Clause of the Eighth Amendment, The Due Process Clause of the Fourteenth Amendment or The Equal Protection Clause of The Fourteenth Amendment 6

(A) Jackson's Commitment Was Neither Cruel and Unusual Punishment Nor A Deprivation of the Due Process of The Laws 9

(B) Jackson's Commitment Under The Circumstances of This Case Does Not Constitute A Violation of The Equal Protection Clause of The Fourteenth Amendment to the Constitution of the United States 17

Conclusion 30

TABLE OF AUTHORITIES

Cases: *Page*

Barfield v. Settle, 209 F.Supp. 143 (W.D. Mo. 1962) 14, 17

Baxstrom v. Herold, 383 U.S. 107 (1966) 6

Brown v. Peterson, 429 F.2d 585 (8th Cir. 1970) .. 9

Carman v. Settle, 209 F.Supp. 64 (W.D. Mo. 1962) 17

Fornaris v. Ridge Tool Co., U.S., 91 Sup.Ct. (1970) 23

England v. Medical Examiners, 375 U.S. 411 (1964) 23

Forthofer v. Swope, 103 F.2d 707 (9th Cir. 1939) 14

Frye v. Settle, 368 F.Supp. 7 (W.D. Mo. 1958) ..13, 14

Greenwood v. United States, 350 U.S. 366 (1956) 8, 12, 13, 14, 17

Greenwood v. United States, 219 F.2d 376 (8th Cir. 1955) 13, 14, 15, 17

Harrison v. Settle, 151 F.Supp. 372 (W.D. Mo. 1957) 14

Jackson v. State, __ Ind. __, 255 N.E.2d 515 (1970) 15, 16, 26, 27, 30

In Re Kemmler, 136 U.S. 436 (1890) 10, 11

Louisiana v. Resweber, 329 U.S. 459 (1947) 10

Lynch v. Overholser, 369 U.S. 705 (1962) 15, 23

Maurietta v. Ciccone, 305 F.Supp. 775 (W.D. Mo. 1969) 17

McGautha v. California, U.S., 91 S.Ct. 1454 (1971) 31

TABLE OF AUTHORITIES—Continued

Cases:—Continued

Nason v. Superintendent of Bridgewater State Hospital, 353 Mass. 604, 233 N.E.2d 908 (1968) 12, 13, 15, 17, 29

Pavlick v. Settle, 203 F.Supp. 42 (W.D. Mo. 1962) 17

People ex rel. Myers v. Briggs, 46 Ill.2d 281, 263 N.E.2d 109 (1970) 29

Powell v. Texas, 392 U.S. 514 (1968) 10, 11, 12, 16

Regina v. Roberts, 2 All England Reports 340 (1953) 29

Robinson v. California, 370 U.S. 660 (1962) 7, 10, 11, 12

Royal v. United States, 274 F.2d 346 (10 Cir. 1960) 14, 17

Specht v. Patterson, 386 U.S. 605 (1967) 6

Tyler v. Harris, 226 F.Supp. 852 (W.D. Mo. 1964) 17

United States v. Barnes, 175 F.Supp. 60 (S.D. Cal. 1959) 15, 17

United States v. Jackson, 306 F.Supp. 4 (N.D. Cal. 1969) 12

United States ex rel. Schuster v. Herold, 410 F.2d 1071 (2nd Cir. 1969) 6

United States ex rel. Van Wolfersdorf v. Johnston, 317 F.Supp. 66 (S.D. N.Y. 1970) 12, 13, 17

Weems v. United States, 217 U.S. 349 (1910) ... 10

Wilkerson v. Utah, 99 U.S. 130 (1878) 10

Youtsey v. United States, 97 Fed. 937 (6th Cir. 1899) 14

TABLE OF AUTHORITIES—Continued

Page

Constitution of the United States:

Amendment VIII 1, 4, 9, 10, 12

Amendment XIV

Due Process Clause 2, 4, 6, 9, 12, 13, 14, 16

Equal Protection Clause 2, 4, 5, 6, 17, 20, 28, 30

United States Statutes:

18 U.S.C. §§ 4242-4248 .....8, 13

Indiana Statutes:

I.C. 1971, 35-5-3-2, as found in BURNS IND. STAT. ANN. § 9-1706a (1970 Supp.) 1, 4, 5, 6, 13, 17-30

I.C. 1971 (multiple citations) as found in BURNS IND. STAT. ANN. §§ 22-301 *et seq.* (Generally) ..21, 27

I.C. 1971 (multiple citations) as found in BURNS IND. STAT. ANN. §§22-1201 *et seq.* (Generally).. 21

I.C. 1971 (multiple citations) as found in BURNS IND. STAT. ANN. §§ 22-1301 *et seq.* (Generally).. 21

I.C. 1971, 16-14-16-1 to 16-14-16-5, as found in BURNS IND. STAT. ANN. §§ 22-1306 to 22-1310 (1964 Repl.) (Generally) 22

I.C. 1971, 16-14-16-2, as found in BURNS IND. STAT. ANN. § 22-1307 (1964 Repl.) 26

I.C. 1971, 16-14-15-6, as found in BURNS IND. STAT. ANN. § 22-1311 (1964 Repl.) 25

I.C. 1971, 16-15-4-1 *et seq.*, as found in BURNS IND. STAT. ANN. §§ 22-1801 *et seq.* (Generally) 26

I.C. 1971, 16-15-4-2 *et seq.*, as found in BURNS IND. STAT. ANN. § 22-1814 (1964 Repl.) ..18, 21, 22, 24, 25

TABLE OF AUTHORITIES—Continued

Indiana Statutes:—continued — *Page*

I.C. 1971 (multiple citations) as found in BURNS IND. STAT. ANN. §§ 22-1901 *et seq.* (Generally) . . 25, 26

I.C. 1971, 16-15-3-1, as found in BURNS IND. STAT. ANN. § 22-1901 (1970 Supp.) 26

I.C. 1971, 16-15-1-3, as found in BURNS IND. STAT. ANN. § 22-1907 (1969) Repl.) 5, 16, 17-30

I.C. 1971, 16-15-1-4, as found in BURNS IND. STAT. ANN. § 22-1908 (1964 Repl.) 26, 27

I.C. 1971, 16-15-2-1, as found in BURNS IND. STAT. ANN. § 22-1910 (1964 Repl.) 25

I.C. 1971, 16-13-2-1(6), as found in BURNS IND. STAT. ANN. § 22-5032(6) (1964 Repl.) 27, 30

Other:

Caleb Foote, *A Comment on Pre-Trial Commitment Of Criminal Defendants,* 108 U. Pa. L. Rev. 833 (1960) 9, 14

38 C.J.S., Grand Juries § 34, p. 1027 13

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THEON JACKSON,
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

Whether Jackson's commitment to the Indiana Department of Mental Health under Burns § 9-1706a, as incompetent to stand trial on two charges of robbery, constitutes a violation of:

a) The proscription against the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States;

b) the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; or,

c) The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

On May 6, 1968, Petitioner, Theon Jackson, hereafter referred to as Jackson, was charged with two separate counts of robbery. (A. 1-3). Subsequently, Jackson, by counsel, moved for the appointment of an interperter, alleging that he was a deaf mute, uneducated, unable to understand, read, write or speak the English language or to communicate with counsel in general. (A. 4-5). Being duly advised that Jackson might lack sufficient comprehension to understand the nature of the charges against him and to aid his counsel in his defense, the Marion Criminal Court, Division 1, the state court having jurisdiction to try Jackson on the robbery charges, appointed two psychiatrists to examine him for the purpose of determining whether he was competent to stand trial. (A. 6). On December 18, 1968, a hearing was held in criminal court to determine whether Jackson lacked sufficient comprehension to stand trial. (A. 7). On December 26, 1968, the Marion Criminal Court found that Jackson lacked sufficient comprehension to make a defense and ordered him committed to the Indiana Department of Mental Health until competent to stand trial. (A. 7). The evidence adduced at the hearing in Marion Criminal Court fully supported the findings of that court. (A. 13-21). On appeal, the Indiana Supreme Court affirmed the judgment of the Marion Criminal Court. Jackson challenges the validity of the decision of the Indiana Supreme Court in this case.

Jackson is a deaf mute. (A. 13, 15). He could not read, write, speak, hear or communicate by sign language to a degree that he could have assisted in his defense as of December 26, 1968, the day of his commitment. (A. 13, 14, 16, 20). As of that day he had the mental comprehension of a three or four year old deaf child.

Jackson was born in Greenwood, Mississippi. At the time of the hearing in the Marion Criminal Court he was twenty-seven years old. He was born deaf and has been a deaf mute all his life. He never attended school in Greenwood, Mississippi. While in Mississippi he worked in the building construction business. After moving to Indianapolis he worked at a local Holiday Inn helping in the kitchen. Also, since moving to Indianapolis, the Deaf and Dumb School had undertaken to teach Jackson some basic communication skills. At the time of the hearing, he had taken lessons from the Deaf and Dumb School some three years. The lessons had ceased only when Jackson was arrested. (A. 17-18).

Jackson can write and read his own name. (A. 13, 16). He knows a limited number of deaf mutes signs. (A. 13-14). Although Jackson lacked sufficient comprehension to stand trial, he was able to understand a little of what the examining psychiatrist sought to communicate to him. (A. 13). Jackson was able to grasp a few things. (A. 14). In the opinion of the examining psychiatrist, Jackson knew the basic differences between right and wrong. (A. 16, 20). Although the examining psychiatrists were convinced that Jackson lacked sufficient comprehension to stand trial, they could not say that Jackson could never obtain sufficient comprehension to stand trial. (A. 14, 15).

SUMMARY OF ARGUMENT

A starting point in this case is that physchiatry is an inexact science. Accordingly, Jackson's basic premise that he is permanently incompetent to stand trial is speculative at best.

Jackson's commitment does not constitute cruel and unusual punishment in violation of the Eighth Amendment. Jackson has neither been convicted of, nor sentenced for, a crime. The primary purpose of the proscription against cruel and unusual punishment is relevant to the fitness of the punishment imposed. Jackson has not been punished. Jackson's commitment differs not in the slightest from any involuntary commitment.

Similarly, Jackson's contentions that his commitment is in violation of the Due Process Clause of the Fourteenth Amendment must also fall. Jackson was accorded the full procedural safeguards demanded by the Due Process Clause. Significantly, the Due Process Clause of the Fourteenth Amendment, upon which Jackson bases his claim, bars the state from trying Jackson on the robbery charges pending against him. Furthermore, surely the Due Process Clause does not require Jackson's discharge on the criminal charges pending against him for his present incompetency to stand trial. Should Jackson recover, and it cannot be said that he will not, his present incompetency could effectively absolve Jackson of all criminal responsibility for the acts of robbery themselves, even though there has been no trial on the merits to determine whether Jackson committed the acts charged and if so whether he was criminally responsible at the time they were committed.

Jackson's equal protection question hinges on whether Jackson's commitment under Burns § 9-1706a, rather than

under Burns § 22-1907, violates the Equal Protection Clause of the Fourteenth Amendment. Jackson claims he can obtain a discharge under Burns § 22-1907, but not under Burns § 9-1706a. Jackson's claim is based on neither logic nor authority. First of all, a commitment under Burns § 22-1907 may in itself raise grave constitutional questions. It would appear that in a commitment under Burns § 22-1907, the Department of Mental Health may retain some sort of permanent authority over an individual committed under that statute. Secondly, if Jackson's premise that his condition will never change or improve is accepted as true, then Jackson can never obtain a discharge under either Burns § 9-1706a or Burns § 22-1907. And finally, if Jackson's mental condition ever does change or improve he would be entitled to discharge under Burns § 9-1706a before he would ever be entitled to discharge under Burns § 22-1907. Under Burns § 9-1706a all Jackson need do is acquire the ability to communicate. Whereas, under Burns § 22-1907, Jackson would have to satisfy the superintendent of the institution to which he was committed that his mental and physical condition justified discharge, a matter he would be unable to do unless able to communicate.

The Indiana scheme for dealing with individuals in Jackson's condition does not violate the Constitution of the United States. Therefore, the decision of the Indiana Supreme Court should be affirmed.

ARGUMENT

JACKSON'S COMMITMENT UNDER BURNS' § 9-1706a AS INCOMPETENT TO STAND TRIAL ON TWO CHARGES OF ROBBERY DOES NOT CONSTITUTE A VIOLATION OF THE PROSCRIPTION AGAINST THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Jackson characterizes his commitment as imprisonment, a life sentence, a denial of the due process of the law and denial of the equal protection of the laws. Respondent, hereafter referred to as the State, submits that Jackson's commitment to the Indiana Department of Mental Health is none of these. However, before the State addresses itself to the issues raised by Jackson, two preliminary matters must be considered. The first goes to what this case does not involve. The second tests Jackson's basic contention that he will never obtain sufficient comprehension to stand trial.

This case does not involve a commitment without a hearing or a commitment under a procedure significantly different from that afforded an individual not charged with a crime, *See, E.g., Specht v. Patterson,* 386 U.S. 605 (1967); *Baxstrom v. Herold,* 383 U.S. 107 (1966); *United States ex rel. Schuster v. Herold,* 410 F.2d 1071 (2nd Cir. 1969). This case does not involve a commitment to an institution maintained and controlled by the Indiana Department of Corrections. See, *E.g. Baxstrom v. Herold,*

supra. This case does not involve a conviction for a physical or mental condition over which Jackson had no control. Jackson has been convicted of no crime. See, e.g., *Robinson v. California,* 370 U.S. 660 (1962). This case does not involve a question of whether Jackson is receiving adequate treatment or whether the hospital facilities are adequate. See, E.g., *Nason v. Superintendent of Bridgewater State Hospital,* 353 Mass. 604, 233 N.E.2d 908 (1968).

Secondly, Jackson's basic premise that he is permanently incompetent to stand trial is based on tenuous psychiatric speculation. Psychiatry is not an exact science. Whether it will ever be an exact science is highly questionable. The record shows that at the time of his commitment, on December 26, 1968, Jackson lacked sufficient comprehension to assist in his defense. (A. 13, 14, 16, 20). The record shows that this was because Jackson lacked a knowledge of the deaf mute signs with which to communicate with his interpreters. (A. 14). The record also shows there is a question as to Jackson's mental ability to achieve a degree of facility with sign language to enable him to stand trial for robbery. (A. 14). The record shows that Jackson has assumed a certain amount of responsibility for himself before arrested on charges of robbery. Although he had obtained no formal education prior to moving to Indianapolis, Indiana, he had worked in the building construction trade in Greenwood, Mississippi, and in the kitchen of a local Holiday Inn after moving to Indianapolis. Furthermore, one Mrs. Johnson had taught Jackson three days a week for some three years prior to the time he was arrested. (A. 17, 18). Jackson knew a limited number of deaf mute signs. (A. 13, 14). He was able to understand a little of what the examining psychiatrist sought to com-

municate to him. (A. 13). But he did know the basic differences between right and wrong. (A. 16, 20). No one who testified at the commitment hearing in the Marion Criminal Court could say that Jackson had not the ability to ever grasp a sufficient degree of ability to communicate by sign language to enable him to stand trial on robbery charges. (A. 14, 15).

In *Greenwood v. United States,* 350 U.S. 366 (1956), this Court was faced with a fact situation similar to the case at hand to which it applied 18 U.S.C. §§ 4244-4248, the federal competency statute. Greenwood was incompetent to stand trial and thought unlikely to recover. In other words, at the time this Court reviewed Greenwood's commitment, it was regarded as permanent. Nevertheless, this Court upheld Greenwood's commitment. Justice Frankfurter, the author of this Court's opinion, noted with skeptism that:

> ". . . The record shows that two court-appointed psychiatrists found petitioner sane and competent for trial. While the District Court did not accept their conclusion, the testimony illustrated the uncertainty of diagnoses in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment, even about a situation as unpromising as petitioners, at least as indicated by the report of the United States Medical Center at Springfield. . . ." 350 U.S., at p. 375.

Justice Frankfurter went on to caution that:

> ". . . Certainly, denial of constitutional power of commitment to Congress in dealing with a situation like this ought not rest on dogmatic adherence to one view or another on controversial psychiatric issues. . . ." 350 U.S., at p. 376.

Justice Frankfurter's skeptism was well founded for apparently Greenwood subsequently recovered and was tried and convicted. See Caleb Foote, *A Comment On Pre-Trial Commitment Of Criminal Defendants,* 108 U. Pa. L. Rev. 833, 838 (1960); See also, *Brown v. Peterson,* 429 F.2d 585 (8th Cir. 1970), (same result).

Jackson's basic premise is that he is permanently incompetent to stand trial on the two robbery charges lodged against him. Jackson's incompetence stems from his inability to communicate with his counsel. Jackson argues that he is incapable of ever achieving sufficient communicative skills to aid in his defense and that hence he is permanently incompetent. For the purposes of this argument, the State will accept Jackson's premise that he was incompetent at the time of his commitment to communicate with his attorneys and that Jackson *may never* achieve sufficient communicative skills to assist in his defense. However, the State does so cautiously and respectfully requests this Court to do likewise.

A) Jackson's Commitment Was Neither Cruel and Unusual Punishment Nor A Deprivation of The Due Process Of The Laws.

Jackson makes certain allegations of fact regarding the nature and circumstances of this case, cites authorities, claims cruel and unusual punishment and a violation of the due process of the laws, but fails to point out in what way these constitutional provisions are violated. The record shows that Jackson stands accused of having perpetrated a robbery against two different persons on two different occasions. (A. 1-3). Before he was tried on those charges, a court of competent jurisdiction, after an adversary hearing at which Jackson was represented by

counsel, determined that Jackson was incompetent to stand trial on the robbery charges. (A. 7). Accordingly, he was committed to the Indiana Department of Mental Health until such time as he was competent to stand trial on the robbery charges. (A. 7). Jackson characterizes his commitment as a penal sentence to life imprisonment. Jackson also claims that he lacked criminal responsibility at the time of the commission of the offense, that his confinement is permanent and non-remedial and that the sole basis of his commitment are two unproved criminal charges. Jackson claims that these facts and circumstances constitute cruel and unusual punishment and a deprivation of the due process of the laws. The State submits that Jackson has mischaracterized the nature and circumstances of his commitment and that Jackson's commitment does not constitute cruel and unusual punishment or a deprivation of the due process of the law. Since Jackson argues that the same facts and circumstances constitute a violation of both Amendments to the Constitution and discusses them as one, so will the State.

An analysis of the cases construing the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution of the United States discloses that Jackson's commitment under the circumstances of this case is neither cruel nor unusual nor, indeed, is it punishment. In the cases reviewed by counsel for the State, the Cruel and Unusual Punishment Clause has been limited in application to punishments inflicted for the conviction of a crime. See *E.g., Powell v. Texas,* 392 U.S. 514 (1968); *Robinson v. California,* 370 U.S. 660 (1962); *Louisiana v. Resweber,* 329 U.S. 459 (1947); *Weems v. United States,* 217 U.S. 349 (1910); *In Re Kemmler,* 136 U.S. 436 (1890); *Wilkerson v. Utah,* 99 U.S. 130 (1878). In *Powell v. Texas, supra,* this Court said, at pp. 531-532, that:

> ". . . The primary purpose of the clause [cruel and unusual punishment] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed." (citing authorities)

Jackson has been convicted of no crime. Jackson has not been sentenced to life imprisonment at a penal institution. A sentence is imposed as punishment for the conviction of a crime. Jackson has neither been convicted of a crime nor is he being punished. Jackson's commitment even if regarded as permanent, differs not in the slightest from any involuntary commitment. Even though involuntary, such a commitment is not a sentence, punishment or imprisonment. As Justice Douglas noted in his concurring opinion in *Robinson v. California, supra,* at pp. 668-679, ". . . [c]ruel and unusual punishment results not from confinement, but from convicting the addict of a crime . . ." at p. 676. Jackson has been convicted of no crime. Hence, Jackson's commitment cannot be regarded as punishment within the meaning of the Clause.

Similarly, even if by some stretch of the imagination Jackson's commitment could be regarded as punishment, it cannot be regarded as cruel within the meaning of the clause.

> ". . . Punishments are cruel when they involve torture or a lingering death . . . [i]t implies . . . something inhuman and barbarous, something more than the mere extinguishment of life." *In Re Kemmler,* 136 U.S. at p. 447.

Jackson's proposition that he was committed to the Department of Mental Health in violation of the Cruel and

Unusual Punishment Clause of the Eighth Amendment is without authority and in the final analysis contrary to the established authority. Jackson's commitment is neither punishment nor cruel and unusual. *Greenwood v. United States,* 350 U.S. 366 (1956), (by implication). *Nason v. Superintendent of Bridgewater Hospital,* 353 Mass. 604, 233 N.E.2d 908 (1968). *Contra, United States ex rel. von Wolfersdorf v. Johnston,* 317 F.Supp. 66 (S.D.N.Y. 1970); *United States v. Jackson,* 306 F.Supp. 4 (N.D. Calif. 1969). However, in both *Wolfersdorf* and *Jackson,* the district court erroneously adopted an expansive meaning of *Robinson v. California, supra,* which this Court expressly rejected in *Powell v. Texas,* 392 U.S. 514, 532-534 (1968), a matter both district courts ignored.

Jackson's argument that his commitment is in violation of the Due Process Clause of the Fourteenth Amendment is unclear. The Eighth Amendment only applies to the States through the Due Process Clause of the Fourteenth Amendment.

If Jackson's argument based on the Due Process Clause of the Fourteenth Amendment is taken to mean the Eighth Amendment as applied to the States through the Fourteenth Amendment, then, in addressing itself to Jackson's Eighth Amendment argument, the State has addressed itself to Jackson's due process argument as well. If, on the other hand, Jackson is taken as raising separately an argument based on the Due Process Clause of the Fourteenth Amendment, then the State must, and of consequence does, address itself to that argument. Having qualified itself, the State must now say that it is at somewhat of a loss to ascertain how it is that the Due Process Clause of the Fourteenth Amendment, standing alone, is violated by Jackson's commitment.

The Due Process Clause of the Fourteenth Amendment requires that notice, hearing, review and the commitment itself be in accordance with the precepts of law. The proceedings and commitment itself *were in accordance with the precepts of law.* Jackson was committed under Burns 9-1706a, which is similar to federal law 18 U.S.C. §§ 4242-4248, providing for commitment under similar circumstances. A hearing was held in a state court of competent jurisdiction at which Jackson was present, assisted by counsel and at which both Jackson and the State called witnesses. After a full hearing, Jackson was committed. That commitment was reviewed by the Indiana Supreme Court. Jackson cites no authority for his proposition that his commitment was in violation of the Due Process Clause of the Fourteenth Amendment. There is no showing that Jackson's commitment was in violation of the Due Process Clause of the Fourteenth Amendment. The cases of *Greenwood v. United States,* 350 U.S. 366 (1956); (by implication) *Greenwood v. United States,* 219 F.2d 376 (8th Cir. 1955) (Fifth Amendment Due Process Clause); *Frye v. Settle,* 168 F.Supp. 7 (W.D. Mo. 1958); and *Nason v. Superintendent of Bridgewater Hospital, supra,* support the State's position that Jackson's commitment is not in violation of the Due Process Clause of the Fourteenth Amendment. *Contra, United States ex rel Wolfersdorf v. Johnston, supra.*

According to Jackson, the State must dismiss the pending robbery charged because he was insane (without criminal responsibility) at the time of the commission of the robberies and because he is permanently incompetent to stand trial or violate his due process rights. Clearly, Jackson's incompetency does not bar the State from charging robbery, even though no further proceedings may be had. *Frye v. Settle* 368 F.Supp. 7, 14; 38 C.J.S., Grand

Juries. § 34, p. 1027. Furthermore, Jackson's incompetency does not defeat the State's power to make the initial commitment. *Greenwood v. United States,* 350 U.S. 366, 375; *Royal v. United States,* 274 F.2d 346 (10th Cir. 1960); *Greenwood v. United States,* 219 F.2d 376, 386 (8th Cir. 1955); *Barfield v. Settle,* 209 F.Supp. 143 (W.D. Mo. 1962). Whether Jackson was competent to stand trial bears no relation to Jackson's criminal responsibility at the time of the offenses with which he is charged. *Harrison v. Settle,* 151 F.Supp. 372 (W.D. Mo. 1957). In any event, the record in this case pertains to Jackson's competence on December 26, 1968, the day of the competency hearing only and neither supports nor refutes Jackson's contention that he lacked the capacity to formulate the criminal intent to commit the offenses with which he is charged. That is an entirely separate question, the answer to which can be determined only when Jackson becomes competent to stand trial. The State has properly obtained jurisdiction of Jackson and properly committed him. But if the State were to try Jackson at this time on the charges of robbery pending against him, the State would assuredly violate Jackson's due process rights. The Due Process Clause of the Fourteenth Amendment absolutely bars the State from trying Jackson so long as he is incompetent to assist in his defense. *Forthofer v. Swope,* 103 F.2d 707, 709 (9th Cir. 1939); *Youtsey v. United States,* 97 Fed. 937, 940-941 (6th Cir. 1899); *Frye v. Settle,* 168 F.Supp. 7, 14-15 (W.D. Mo. 1958); See also, 108 U.Pa. L. Rev. 833, 834 (1966), *supra.*

Jackson's proposed remedy is that the Federal Constitution demands that the robbery charges be dismissed. Jackson proposes a drastic remedy for which he offers neither logic nor authority. Society has an absolute right

to protect itself from its more violent elements. Jackson stands charged with two separate counts of robbery, a crime of violence against the person and hence society. Jackson was arrested and brought before the Marion Criminal Court. Jackson has never challenged the jurisdiction of Marion Criminal Court. Presumably then Jackson is being held lawfully to answer those charges. The duty to protect society devolves upon the State. In this case, the State Lawfully obtained custody of Jackson. Does Jackson's mental condition over-ride the State's duty to protect society? Can Jackson's present mental condition justify a permanent bar to prosecution by the State? The State submits that its role as *parens patriae* in relation to its citizens at large, Jackson's alleged victims and Jackson himself fully justifies the course taken by the State in this case. See, *Lynch v. Overholser,* 369 U.S. 705, 724 (1962) (Clark, J. dissenting); *Greenwood v. United States,* 219 F.2d 376, 387 (8th Cir. 1955); *United States v. Barnes,* 175 F.Supp. 60 (S.D. Calif. 1959); *Jackson v. State,* __ Ind. __ 255, N.E.2d 515, 518 (1970); *Nason v. Superintendent of Bridgewater Hospital, supra,* 233 N.E.2d, at pp. 913-914.

The remedy proposed by Jackson poses legal contradictions. What if this Court orders the robbery charges dismissed and Jackson subsequently obtains sufficient comprehension to assist in his defense? In that event, Jackson's present incompetency to stand trial would have served to absolve him of all criminal responsibility for the acts of robbery themselves, even though there had been no trial on the merits to determine whether Jackson committed the acts charged and if so whether he was criminally responsible at that time. On this record, it cannot be said that even if Jackson committed the acts charged, he was not criminally responsible. The record clearly shows that

Jackson knows the basic differences between right and wrong, the basis of criminal responsibility in Indiana. (A. 16, 20). Yet, the Due Process Clause bars the State from trying Jackson on those charges because he is incompetent to assist in his defense.

Other questions would arise if this Court ordered dismissal of the charges with leave for the State to obtain commitment under some other statute. What if the State could not obtain Jackson's commitment by some other means? Must the State then unconditionally release Jackson? For instance, Jackson claims that the State should have committed him under Burns § 22-1907. However, for the reasons set out later under the equal protection question discussed by the State, the State seriously questions whether Jackson could be committed under Burns § 22-1907. In any event, even if Jackson could be committed under Burns § 22-1907, the commitment would be a useless act. A commitment under Burns § 22-1907 would be to the Department of Mental Health which by its Commissioner would assign Jackson to an appropriate institution. Yet this is the precise commitment enjoyed by Jackson at this very time (This point is discussed fully in the next section of this Brief under the equal protection question). See *Jackson v. State*, __ Ind. __ 255 N.E.2d 515 (1970).

Perhaps the gravest difficulty posed by Jackson's proposed remedy is that it calls for some sort of Federal Constitutional standard of criminal responsibility. Any remedy afforded Jackson by this Court requires that some mental condition standard be devised and applied to Jackson. Yet this Court in no uncertain terms has positively eschewed the establishment of a Federal Constitutional standard of criminal responsibility. See *Powell v. Texas*, 392 U.S. 514, 534-537, 540-546 (1968).

This Court, other lower federal courts, and at least one other state court have upheld similar commitments, such as Jackson's, under similar circumstances. See *Greenwood v. United States,* 350 U.S. 366 (1956), *affirming* 219 F.2d 376 (8th Cir. 1955); *Royal v. United States,* 274 F.2d 346 (10th Cir. 1960); *Tyler v. Harris,* 226 F.Supp. 852 (W.D. Mo. 1964); *Barfield v. Settle,* 209 F.Supp. 143 (W.D. Mo. 1962); *Carman v. Settle,* 209 F.Supp. 64 (W.D. Mo. 1962); *Pavlick v. Settle,* 203 F.Supp. 42 (W.D. Mo. 1962); *United States v. Barnes,* 175 F.Supp. 60 (S.D. Calif. 1959); *Nason v. Superintendent of Bridgewater Hospital,* 353 Mass. 604, 233 N.E.2d 908 (1968); *Contra, United States ex rel. von Wolfersdorf v. Johnston,* 317 F.Supp. 66 (S.D.N.Y. 1970); *Maurietta v. Ciccone,* 305 F.Supp. 775 (W.D. Mo. 1969). This Court should also uphold Jackson's commitment.

B) Jackson's Commitment Under The Circumstances of This Case Does Not Constitute A Violation of the Equal Protection Clause of the Fourteenth Amendment to The Constitution of the United States.

Jackson complains that his commitment constitutes a violation of the equal protection of the laws. The basis of his argument is that he is permanently incompetent to stand trial. The basis of that incompetency is his inability to communicate with counsel for the purpose of assisting in his defense (A. 14), a skill Jackson claims he can never achieve. Jackson goes on to claim that he is feeble-minded and that he should have been committed under Burns § 22-1907 providing for the commitment of the feeble-minded. Jackson claims that commitment under Burns § 9-1706a is for life but implies that commitment

under Burns § 22-1907 is not. The reason for this, argues Jackson, is that the provisions for discharge from commitments under Burns § 9-1706a and Burns § 22-1907 differ substantially. Furthermore, Jackson claims that had he been committed under Burns § 22-1907 he would have been entitled to furloughs while committed and eventual discharge under Burns § 22-1814. The responses to Jackson's claims are several.

First of all, can it be said at this time on this record that Jackson is permanently incompetent to stand trial on the robbery charges? The State submits not. As pointed out earlier in this Brief, a conclusion that Jackson is permanently incompetent to stand trial is at best tenuous and at worst manifest speculation. Psychiatry has not as yet achieved such a level of exactitude that it can be said on this record that Jackson is permanently incompetent. Absent Jackson's basic premise that he is permanently incompetent to stand trial, the entire edifice of his argument must fall.

Jackson clings to the notion that he is feeble-minded within the meaning of Burns § 22-1907 and hence should have been committed under that statute. The State submits that on this record it is highly questionable whether Jackson could have been committed under the provisions of Burns § 22-1907. A condition of commitment under Burns § 22-1907 is that the party to be committed is ". . . feeble-minded and is not insane. . . ." Significantly, although there was testimony at Jackson's competency hearing that he was feeble-minded (A. 15), Jackson was in fact found by the committing court to be insane within the meaning of Burns § 9-1706a. (A. 7) Doctor Schuster also testified that Jackson was insane. (A. 15). Burns § 9-1706a speaks in terms of "sane", "insane",

"sanity" and "insanity" and provides that " . . . the trial shall be delayed or continued on a ground of the alleged insanity of the defendant. . . ." Insanity within the meaning of Burns § 9-1706a means a lack of ". . . comprehension sufficient to understand the proceedings and make his defense. . . ." The record fully supports a conclusion that Jackson lacked sufficient comprehension to understand the proceedings and make his defense within the meaning of the statute. The Marion Criminal Court committed Jackson ". . . until such time that the Division of Mental Health shall certify to this Court that the defendant is *sane.*" (A. 7). Accordingly, Jackson has been duly adjudicated insane within the meaning of Burns § 9-1706a by the courts of Indiana. The State submits that the word "insane" as it appears in Burns § 9-1706a and Burns § 22-1907 means the same thing. Thus, since Jackson was committed under Burns § 9-1706a as insane he could not have been committed under Burns § 22-1907 as feeble-minded because commitment under Burns § 22-1907 is limited to those who are not "insane".

Even if Jackson could hurdle the adjudication of insanity under Burns § 9-1706a, seemingly barring a commitment under Burns § 22-1907 for those who are *insane,* this record is absolutely barren of evidence to support Jackson's hypothesis that he *could have been or could be* committed now to the Department of Mental Health under Burns § 22-1907. In addition barring the commitment of the feeble-minded who are insane, Burns § 22-1907 also bars the commitment of the feeble-minded who are epileptic or who are not free from infectious or contagious diseases or vermin. There is nothing in this record to show that Jackson is not epileptic or free from infectious or contagious diseases or vermin. Hence, this record does not

support Jackson's position that he could have been or could be committed now under the provisions of Burns § 22-1907.

Assuming *arguendo* Jackson was eligible for commitment under Burns § 22-1907 as well as Burns § 9-1706a, Jackson claims that the State had a duty to obtain his commitment under Burns § 22-1907 and that there are substantial differences between proceedings under Burns § 22-1907 and Burns § 9-1706a constituting a violation of the Equal Protection Clause. Parenthetically, Jackson mischaracterizes Burns § 9-1706a as a criminal commitment proceeding and Burns § 22-1907 as a civil commitment proceeding. This is a myth which the State will dispel shortly. Turning first to a comparison of the commitment procedures under the two statutes, the State submits that an equal protection question is not raised.

Before embarking on a comparison of the statutory provisions explicitly put into issue by Jackson, it must be pointed out that there are other statutory provisions affecting the commitments, transfers, privileges and discharges of those committed under the authority of Burns § 22-1907. The laws concerning commitments to state psychiatric hospitals in Indiana have been enacted on a piecemeal basis. New laws have been enacted without regard to their affect on old laws. The result is a mass of legislation which is duplicative, overlapping, supplementary, or complementary or which sometimes supercedes or repeals by implication earlier legislation. The Indiana Appellate and Supreme Courts have not been called upon to reconcile this mass of legislation. Hence, it remains unreconciled. Accordingly, in this Brief, the State will address its arguments to the statutory provisions cited and relied upon by Jackson, merely noting that there are other

statutory provisions applying to the same subject matter. For instance, Burns §§ 22-301 et seq. affects transfer among State institutions and Burns §§ 22-1201 et seq. affect commitments and discharges under Burns §§ 22-1907 and Burns § 22-1814. It is the State's position that the additional legislation affecting Jackson's Burns § 22-1907 arguments is duplicative and does not affect the State's arguments in this case.

An examination of the commitment procedures provided by Burns § 9-1706a and Burns § 22-1907 discloses that the procedure for commitment under either is substantially the same. Under either statute, an individual's mental condition may be brought to the attention of a court of competent jurisdiction. Under either statute, the hearing court must appoint two "physicians" who are ordered to examine the person whose mental condition is in question. Under either statute, the hearing court must conduct a hearing at which the person to be committed may appear personally and by counsel. If after hearing, the hearing court determines that the mental condition of the party before it justifies it, the hearing court may order that party committed to the Department of Mental Health. Under either statute, the hearing court's determination is subject to review in the appellate courts of the State. Hence, the commitment procedure under either statute is substantially the same. For other provisions affecting the commitment procedure under Burns § 22-1907, see Burns §§ 22-1201 *et seq.* and Burns §§ 22-1301 *et seq.* providing for substantially the same procedure.

Secondly, a comparison of the discharge provisions of the two statutes does not disclose an equal protection violation. Burns § 9-1706a provides for discharge on the following conditions:

> ". . . Whenever the defendant shall become sane the superintendent of the State psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. . . ."

On the other hand, had Jackson been committed under the provisions of Burns § 22-1907, he would be entitled to discharge from the Indiana Department of Mental Health in accordance with the provisions of Burns § 22-1814, which provides that:

> "Any person may be discharged from the colony at any time by the board of trustees (commissioner of mental health), provided only that no person shall be discharged from the said colony until, in the judgment of the superintendent, the mental and physical condition of the patient justifies it."

For other provisions affecting discharge under Burns § 22-1907, see Burns §§ 22-1306 to 22-1310. The standard for discharge under Burns § 9-1706a is that the committed person has become sane (". . . comprehension sufficient to understand proceedings and make his defense. . ."). The standard for discharge under Burns § 22-1907 is that the mental and physical condition of the patient justifies it. Under either statute, discharge from the Department of Mental Health is had upon the certification of the superintendent of the hospital in which the committed person is confined.

This Court is called upon to construe the meaning and affect of these two statutory provisions of the State of Indiana as applied to Jackson. Neither the Indiana Appellate nor Supreme Court have construed the discharge pro-

visions of these two statutes. In the past, decisions of this Court have required that the state courts first be given an opportunity to construe their own statutes constitutionally. *Fornaris v. Ridge Tool Co.,* U.S., 91 S.Ct. 156 (1970), citing *England v. Medical Examiners,* 375 U.S. 411, 420 (1964). Inasmuch as this case is now before this Court for review on the merits, it is this Court that must construe the discharge provisions under these statutes. If there is any way to construe the discharge provisions of these statutes constitutionally as applied to Jackson, it must be done. *Lynch v. Overholser,* 369 U.S. 705, 710-711 (1962).

The equal protection question as applied to Jackson on this record is whether the standard for discharge under Burns § 22-1907 is a lesser standard than that of Burns § 9-1706a. Having stated the question so, the State is immediately struck with the thought that the question presupposes that there exists a continuous range of mental conditions from a lower level, by degrees, to a higher level, that the statutory provisions involved here define some mental condition conveniently found on that range and that the position of Jackson on that range may be conveniently determined. The State submits that that presupposition has little foundation in fact. The type, degree and affect of a mental disease on an individual differs from case to case. Hence, few generalizations may be made. Each individual must be taken singly. Be that as it may, the State believes that the statutory discharge provisions involved here may be construed constitutionally. Turning to the statutory discharge provisions, the State submits that the standard for discharge under either statute encompasses a class of mental conditions and that the classes overlap conceptually. The classes are not mutually exclusive, but have some mental conditions in common, that is to say, there are some mental conditions common to both.

If Jackson's position in his Brief be accepted by this Court, then Jackson could have been committed under either statute. Jackson claims that he is feeble-minded and should have been committed under Burns § 22-1907. Dr. Schuster testified at Jackson's competency hearing that he was feeble-minded. (A. 15). On the other hand, the record clearly shows that Jackson was properly committed under Burns § 9-1706a as insane. Dr. Schuster also testified that Jackson was insane. (A. 15). The basis of Jackson's position is that his mental condition, whatever that be, will never improve. If that position be accepted by this Court, then it is only reasonable to conclude that Jackson could never be discharged under the provisions of either statute. For discharge under Burns § 9-1706a, Jackson must achieve sufficient communicative skills to assist in his defense. (A. 14). If, as Jackson argues, his condition will never improve, then he can never achieve sufficient communicative skills to obtain a discharge under Burns § 9-1706a. Similarly, if Jackson could be committed properly under Burns § 22-1907 and if his condition will never improve, then he can never obtain discharge under Burns § 22-1814, the discharge provision for commitment under Burns § 22-1907. Burns § 22-1907 is an involuntary commitment. If the condition of a person at the time of his commitment justifies a commitment under Burns § 22-1907 then, to be entitled to discharge under Burns § 22-1814, his condition must change or improve. But the very basis of Jackson's position is that his condition will never change or improve, Thus, by Jackson's own argument, he can never be entitled to discharge under Burns § 22-1814. If so, then Jackson can never obtain discharge under the provision of either statute. If, on the other hand, this court rejects Jackson's position that his condition will never change or improve then, if Jackson could obtain discharge under

Burns § 22-1814, he could as well obtain discharge under Burns § 9-1706a. To say that Jackson's mental condition could or could not, change or improve sufficiently to obtain a release under Burns § 22-1814 is manifest speculation and not a conclusion supported by the record in this case.

A comparative analysis of the discharge provisions under Burns § 9-1706a and Burns § 22-1907 discloses other considerations bearing on Jacksons equal protection question. Significantly, a discharge from a commitment made under Burns § 22-1907 is very limited indeed and does not amount to an unconditional discharge. See Burns §§ 22-1901 to 22-1913. Although Burns § 22-1814 provides for discharge, the affect of that discharge is somewhat limited by the provisions of Burns § 22-1910. Under Burns § 22-1910 an individual once adjudicated feeble-minded though discharged, may be recommitted upon no more than a reputable physician's sworn statement that the individual was a former patient and should be recommitted to the Department of Mental Health. See Burns § 22-1910; See also Burns § 22-1311. In view of the statutory scheme for the commitment, discharge, and recommitment of those adjudged feeble minded under Burns § 22-1907, had Jackson been committed as feeble-minded, his commitment would have been permanent with considerably less safeguards than presently afforded him under Burns § 9-1706a, the statute under which Jackson was actually committed. As a matter of fact, a commitment under Burns § 22-1907 could raise grave constitutional questions.

Another factor alleged by Jackson to give rise to a denial of the equal protection of the laws an allegation by Jackson that had he been committed under Burns § 22-1907, he would have been eligible for furloughs while confined and implies that no such opportunities are available to

one committed under Burns § 9-1706a. The authority for the proposition that those committed as feeble-minded may obtain furloughs while confined is Burns § 22-1908. See also Burns § 22-1307 (leave of absence). The statute expressly provides that ". . . [f]urloughs and discharges may be given to the patients as provided by such regulations." Jackson's argument that because he was committed under Burns § 9-1706a, and cannot be furloughed, his right to the equal protection of the laws has been violated, is without merit. Jackson's argument in this regard is a factually and conceptually mistaken. The furlough provision of Burns § 22-1908 is a privilege available to those committed to the Muscatatuck State Hospital and Training Center. See Burns § 22-1901. Each psychiatric hospital in the State of Indiana under the control of the State has been created and established under the authority of laws enacted by the legislature expressly authorizing the creation and establishment of a specific institution. Thus, for instance, Muscatatuck was created and established under the authority of Burns §§ 22-1801 to 22-1815, parts of which have since been superseded by Burns §§ 22-1901 to 22-1913. The furlough provision to which Jackson refers applies only to those confined at Muscatatuck. The statute under which one is committed has absolutely nothing to do with the privileges to which a confined individual might be entitled. Furthermore, commitment under either statute is to the Department of Mental Health. *Jackson v. State*, __ Ind. __ 255 N. 2d 515 (1970) Jackson was in fact committed to the Department of Mental Health. (A. 7). Transfer among state psychiatric institutions is solely administrative. *Jackson v. State, supra.* The Indiana law on the subject specifically provides that the Commissioner of the Department of Mental Health has the power, at his discretion ". . . [t]o transfer psychiatric patients in state

hospitals and institutions for the care of such patients from one hospital or institution to another. . . ." Burns § 22-5032(6). For other provisions affecting transfer, see Burns §§ 22-301 *et seq.* Further augmenting the discretionary authority of a Commissioner of the Department of Mental Health to transfer patients from one psychiatric institution to another is Burns § 22-1907, itself, which expressly provides that the Commissioner of the Department of Mental Health "... may authorize transfer such application from the institution to which the person is committed to any other institution, if there shall be no room therein. . ." The point is that even though committed under Burns § 9-1706a, Jackson could have been, or may even be confined presently, at Mascatatuck. *Jackson v. State supra.* If he is, or were to be, the State knows of no bar preventing Jackson from obtaining a furlough while at Mascatatuck. On the other hand, even if Jackson had been committed, under Burns § 22-1907, to the Department of Mental Health, he could have been transferred to some other State psychiatric institution, in which event he would not be entitled to the furlough privilege of Burns § 22-1908.

Taking the matter from a different view, Jackson claims that if committed under Burns § 22-1907 he would possibly be eligible for furloughs from the hospital and would be eligible for discharge from the hospital when "in the judgment of the superintendent, the mental and physical condition of the patient justifies it," but that having been committed under Burns § 9-1706a he will never be eligible for furlough and will not be eligible for discharge until he can communicate with his lawyers and participate in his own defense. Jackson understandably makes no attempt to describe the specific conditions under which he would

be furloughed or discharged, but instead leaves those conditions to the imagination of the Court. Surely the Court can not imagine the superintendent discharging Jackson from the hospital without first having formed some basis of communication with him. If Jackson can communicate with the Superintendent either directly or through an intermediary, then he can communicate with his lawyer either directly or through an intermediary. If he can learn the former he can learn the latter. Under either statute the prerequisite to discharge is the same, the development of some ability to communicate.

It should be noted that the difference between the phrases "prerequisite to discharge" and "standard for discharge" is significant. Under a Burns § 22-1907 commitment the superintendent may develop a means of communication with Jackson and still determine for other reasons, that he should not be released. Under Burns § 9-1706a the development of a means of communication with Jackson would automatically cause his discharge from the mental institution, though he might subsequently be confined to a penal institution if, and only if, a jury should determine both that he committed the acts with which he is charged and that he was legally sane at the time he did so.

In short, if Jackson's contention that he would never become competent to stand trial is true, then his commitment is for life under either statute. If, however, Jackson's contention is not true, then only a commitment under Burns § 9-1706a will guarantee his release from the Department of Mental Health as soon as he gains sufficient competence.

Jackson's sole authority for the proposition that the commitment in this cause is in derogation of the Equal

Protection Clause are the cases of *Nason v. Superintendent of Bridgwater Hospital,* 353 Mass. 604, 233 N.E.2d 908 (1968) and *People ex rel. Myers v. Briggs,* 46 Ill.2d 281, 263 N.E.2d 109 (1970). Neither case affords Jackson any solace. Nason alleged *inter alia* that his indefinite confinement to a hospital for the mentally ill because incompetent to stand trial was a denial of the equal protection of the laws in that the hospital in which he was committed fell substantially below the medical standards of other state hospitals. 233 N.E.2d at p. 909. Noting certain inadequacies in the medical treatment afforded Nason, the court held no more than that ". . . if adequate treatment for Nason is not provided there within a reasonably time, the legality of his further confinement may be presented to the county court." 233 N.E.2d at p. 914. Significantly, the court in *Nason* expressly noted that it could ". . . perceive no denial to Nason of any constitutional right merely because of his confinement . . ." so long as he was afforded adequate treatment. 233 N.E.2d, at p. 913. *Nason* was decided solely on the basis of the treatment afforded Nason and a comparative analysis of the medical standards among the state institutions. No such questions are presented in this case.

The *Briggs* case does no more than illustrate the resolution of a factually similar matter by the courts of Illinois. The basis for the Illinois Supreme Court's disposition is unclear. The case does not appear to have been decided on the basis of constitutional considerations. The primary authority for the court's disposition was the *English* case of *Regina v. Roberts,* 2 All England Reports 340 (1953). Significantly, Lang was not ordered released. What the court did order was that Lang be arraigned and tried on the charges pending against him. The State submits that this case represents no more

than one jurisdiction's disposition of a similar matter. It is not a disposition required by the Constitution of the United States. Furthermore, the Illinois resolution of the matter may, in and of itself, create grave constitutional problems. For instance, what if Lang should be convicted on trial? May he then be imprisoned? Or must the State hospitalize Lang and await his recovery for the purposes of re-trying him?

Although commitment in Indiana to psychiatric institutions are triggered under different statutes and for different reasons, all commitments are to the Indiana Department of Mental Health. *Jackson v. State, supra;* Burns § 9-1706a; Burns § 22-1907. As to the institution in which a committed party is sent, that is entirely within the discretion of the Commissioner of the Department of Mental Health. And even though the Commissioner may initially place a committed individual in one institution or another, the Commissioner is authorized by statute to transfer from one institution to another within his discretion. *Jackson v. State, supra;* Burns § 22-1907; Burns § 22-5032(6). Significantly, Jackson's commitment is not to an institution within the control of the Department of Corrections. For all practical purposes, there is no civil or criminal commitment in Indiana. Jackson's contentions that his commitment is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is without merit.

CONCLUSION

The question regarding Jackson's commitment cannot be whether it is the best possible solution for a thorny issue, but rather, the question must be whether the Federal Constitution proscribes the Indiana's solution for Jackson.

McGautha v. California, U.S., 91 S.Ct. 1454, 1461, 1476-1477 (1971). The State submits that the Federal Constitution does not bar the Indiana solution for Jackson. Therefore, the decision of the Indiana Supreme Court being reviewed here should be affirmed.

Respectfully submitted,

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